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James Beardsley

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# Compelling Contract Performance in France

By JAMES BEARDSLEY

Member of California and Illinois Bars; engaged in private practice in Paris, France.

ARTICLE 1142 of the Code Napoleon declares that "[e]very obligation to do or not to do shall be resolved in damages in case of non-performance by the obligor." Specific performance, the draftsmen seemed to say, is not to be had where a contract imposes this kind of obligation. But Article 1142 was arguably intended and has certainly been interpreted, primarily as an expression of the maxim *nemo potest praecise cogi ad factum* which in turn could be seen as prohibiting the use of force to compel performance rather than as the consecration of a damages-only rule on remedies.<sup>1</sup> The courts and doctrinal writers were in agreement that in principle the disappointed promisee was entitled to performance where it could be obtained without physical coercion.<sup>2</sup>

The difficulty lay not in the principle but in its implementation. French courts do not possess the power to fine or imprison the contemnors of their civil judgments.<sup>3</sup> Their sole weapon is the judgment

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[Ed. Note — The Hastings International & Comparative Law Review assumes all responsibility for any mistakes in the footnotes. Due to a mail strike in France, the author was unable to approve the final version.]

1. On the intention see Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 509-11 (1959) [hereinafter cited as Dawson]. For the interpretation, see, e.g., 7 PLANIOL et RIPERT, *TRAITÉ PRATIQUE ET THÉORIQUE DE DROIT CIVIL FRANÇAIS* (2d ed. 1954) §§ 780, 820; 2.1 MARTY et RAYNAUD, *DROIT CIVIL. LES OBLIGATIONS* § 663 (1962); Kadouch c. Pfeifle (Cass.civ.3e, 19 fév. 1970) 1970 Bull. Civ.III 90 [90.1 Gaz.Pal. 1970. I. 282].

2. The "principle" is sometimes attributed to arts. 1143 and 1144 of the Civil Code which provide that the creditor of an obligation "to do or not to do" may be authorized to perform the obligation himself or have it performed by another at the debtor's expense. See 1 ENCYCLO. DALLOZ DE LA PROCÉDURE CIVILE ET COMMERCIALE 937 (1955).

3. Imprisonment for debt at the instance of the creditor existed for a time but was eliminated by statute in 1867. Law of 22 juillet 1867, *Loi relative à la contrainte par corps*, [1867], Duv. 165 at 190. The 1954 proposal of the Civil Code Reform Commission would have (i) empowered the *juge des référés* to order the performance of obligations "to do" under pain of *astreinte*, which is a civil fine payable to the State, and (ii) allowed the judge to fine or imprison for contempt of court (disruptions, insults, threats, etc.) but not for failure to execute a judgment. Commission de Réforme du Code de Procédure Civile, arts. 93 and 348, pp. 43 and 83 (1954). On the *juge des référés*, see HERZOG, *CIVIL PROCEDURE IN FRANCE* 329-30, 238-39 (1965).

itself adorned with an executory clause (*formule d' exécution*) addressed to the *hussiers de justice* and officers of the police and *gendarmérie* ordering them to lend their assistance in its execution.<sup>4</sup> The execution of a money judgment is accomplished by levy on the debtor's property and a subsequent judicial sale.<sup>5</sup> If the judgment requires the debtor to deliver specific moveable property, the performance of this obligation "to do" can similarly be accomplished through seizure of the property by the *hussier* with the assistance, if needed, of the police.<sup>6</sup> The need alone does not suffice to assure police assistance,

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4. The text of the *formule exécutoire* is prescribed by the Decree of 12 jun 3 1947, [1947] J.O. 5487 ([1947] B.L.D.496; [1947] S.L.A.942) as amended by Decree no. 58-1289 of 22 dec. 1958, [1958] J.O.11608, ([1959] B.L.D. 58). The *hussier de justice* is an *officier ministériel* who is both an official and a representative of the person in whose behalf he is called upon to act. His functions include the service (*signification*) of legal documents and the execution of civil judgments. Once a record is made of his witnessing an event or condition, the matter is virtually incontestable in a legal proceeding. See generally, HERZOG, *supra* note 3, at 92-97.

5. The principle forms of execution, the *saisie-exécution* (movables) and the *saisie-immobilière* (immovables), are governed respectively by arts. 583-625 and 673-717 of the Code of Civil Procedure. See generally, VINCENT, *VOIES D' EXÉCUTION* (11th ed., 1974).

6. This is an area of considerable confusion. The doctrinal writers are quite clear that one entitled to the possession of property may obtain its delivery or surrender and that police assistance should be available to accomplish this by force if necessary. See, e.g., Deprez, *Distinction des obligations de donner, de faire et de ne pas faire*, *JURIS-CLASSEUR CIVIL*, arts. 1136-45, fascicule 1 (1964). But the mechanism is obscure. The duty to transfer title to property (an obligation "to give" rather than to do, C. Civ. arts. 1136-41), for example, is discharged by operation of the principle set out in art. 1038 of the Civil Code (and elsewhere in respect of other kinds of transfers) whereby agreement alone transfers ownership. But even where that principle does not operate the court may accomplish the transfer of title by the judgment itself (*see id.* at § 48) or may appoint a judicial administrator to accomplish the acts necessary for transfer in the name of the transferor. See, e.g., Kadouch c. Pfeifle, *supra* note 1. With title transfer accomplished, the owner must still obtain possession. In respect of the purchase of specific movables, art. 1610 of the Civil Code recognizes the buyer's right to bring an action to be "put in possession." See Martin de la Moutte, *Les Sanctions de l'obligation de délivrance* in HAMEL, ed., *LA VENTE COMMERCIALE DE MARCHANDISES* at 187 (1951). Apart from this explicit provision, the specific performance of the obligation to deliver movables seems to result entirely from the general proposition that specific performance is preferred where practicable. The delivery of movables is the paradigm case in which compulsory performance, if the goods are identified, will normally be both practical and inoffensive. Doctrinal explanation of the right to be put in possession tends to be brief, mysterious and, to some never very precise degree, reliant upon the group of real actions for the enforcement of rights of ownership which appear to provide another basis for "specific performance" of obligations to deliver or surrender property. See, e.g., 7 PLANIOL et RIPERT, *supra* note 1 at § 779. The action in revindication of movables is implied from art. 2279 of the Civil Code whose celebrated rule that "possession amounts to title" where movables are concerned creates some difficulty for the enforcement of duties to deliver movables by this avenue. See, e.g., 2 AUBRY et RAU, *DROIT CIVIL FRANÇAIS* 171-72 (7th ed., by Esmein, 1961). The other real actions include the action in revindication of immovables (*id.*, at 505-518) and the possessory actions regulated by arts. 23-27 of the Code of Civil Procedure which are, however, of doubtful utility in assuring effective transfer to a new owner.

despite the language of the executory formula. There has long been a notorious reluctance on the part of the administrative authorities to provide police assistance in the execution of civil judgments.<sup>7</sup> Where the performance ordered is not the delivery or surrender of property, the problem of the availability of coercive forces rejoin that of the legitimacy of such coercion in light of Article 1142. Using force to separate a debtor from property is one thing; compelling him by physical coercion to perform some agreed task is quite another. For, as it is customarily explained, to do so would infringe his liberty.<sup>8</sup>

The problem of specific performance of contracts in France was thus twofold. On the one hand, it was a matter of finding a substitute for coercion where the requisite State assistance was not forthcoming. On the other hand, it was to devise a form of compulsion or inducement capable of reaching at least some of those situations in which direct coercion was excluded either by Article 1142 or by broader scruples not unlike those which have led Common Law jurisdictions to refuse to order the specific performance of personal service contracts.<sup>9</sup> A solution had to be built around the money judgment, the only sanction available to the courts. The Civil Code itself offered one possibility: the contractual penalty fixing a liability in excess of probable damage in case of failure to perform. The other approach, the *astreinte*, was devised by the courts without statutory support. Both methods rely on the threat of a money judgment substantially exceeding provable damage. Both have been the subject of recent legislation which, with the evolution of the case law on the *astreinte*, has substantially changed what may be called the law of specific performance in France.

## I. JUDICIAL COMPULSION: THE ASTREINTE

The *astreinte* is a money judgment imposing upon the non-performing debtor a liability of a fixed amount per day (or month or year) for every day which passes without performance by the debtor after the date fixed by the judgment. As it was shaped by the case law and the doctrinal writers, the *astreinte* might be either "definitive" or "provisional." In either case, a further judicial decision was required

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7. See, e.g., CALBAIRIC, *L' exécution des décisions de justice*, [1947] D.Jur.85; MARTY et RAYNAUD, *supra* note 1, at 684; and the legislative history discussed *infra* at note 32.

8. MARTY et RAYNAUD, *supra* note 1, at 684.

9. E.g., the artist who refuses to perform a commission to paint a portrait. *Rosa Bonheur c. Pourchet* (Cour Impériale de Paris, 4 July 1865) 1865 D.2.202.

to "liquidate" it by fixing the cumulative amount before execution could be obtained. The definitive *astreinte* took the form of a final judgment whose "liquidation" involved nothing more than a simple multiplication operation. The provisional *astreinte*, on the other hand, was not cast as a final judgment and was subject to revision by the judge at the time of liquidation. On the basis of a further examination of the circumstances, extenuating and otherwise, surrounding the debtor's failure to perform, the provisional *astreinte* could be liquidated at an amount quite different from that originally fixed. The utility of the device in either form as a means of compelling performance obviously depends in very large part upon credibility of the threat to impose a financial liability on the debtor greater than that to which he would be subjected by a judgment awarding actual damages to the creditor. The central problem in the development of the *astreinte* was precisely whether a civil tribunal could ever impose liability for a sum in excess of actual damages.<sup>10</sup>

During the early development of the *astreinte* the focus was elsewhere, principally upon the question of the source of the judicial power to order performance under *astreinte*.<sup>11</sup> Moreover, the problem of the propriety of imposing a penalty in excess of damages, recoverable by one of the parties to a civil lawsuit, was partially masked by the tendency of the courts to call the sum thus awarded "damages."<sup>12</sup> When at last it was squarely confronted with the question, the Court of Cassation refused to sustain an *astreinte* whose liquidated amount was admittedly in excess of the lower court's finding of actual damage.<sup>13</sup>

10. The literature on the *astreinte* is extensive. In addition to the treatises mentioned in the preceding notes and Professor Dawson's excellent description of the institution and its development prior to 1959, *supra* note 1, see *L'Astreinte* in 1 *ENCYCL. DALLOZ DE DROIT CIVIL* (1974) for an extensive treatment accompanied by a useful bibliography.

11. See Dawson, *supra* note 1, at 513-14. The question of the source of judicial authority to impose the *astreinte* never much troubled the courts themselves and the doctrine finally came to accept the theory of inherent power, reinforced by a reference to judicial "orders" in an obscure article of the Code of Civil Procedure (art. 1036), advanced by Esmein in a celebrated article, *L'Origine et la logique de la jurisprudence en matière d'astreinte*, [1903] *REVUE TRIMESTRIELLE DE DROIT CIVIL* 5 [hereinafter cited as *REV. DR. CIV.*]. The Esmein rationale is reflected in the modern case law of the Court of Cassation. See, e.g., *Adam c. Marino* (Cass.civ., 26 avril 1968) [1968] *Bull.Civ.III* 137 ([1968] *D. Jur.* 526). The other principal difficulty had to do with the question whether a judge could revise his own earlier judgment for purposes of "liquidating" the *astreinte* without violating the rule of *res judicata*. The difficulty was overcome merely by recognizing the provisional character of the earlier judgment. See Dawson, *supra* note 1, at 513.

12. See ESMEIN, *supra* note 11, at 13-19.

13. *Galbrun c. Durand* (Cass.civ., 14 mars 1927) [1927] *D. Jur.* 274; \_\_\_\_\_ c. \_\_\_\_\_ (Cass.civ., 27 fév. 1953) [1953] *S. Jur. I.* 196. It is generally believed that the hardening of the Court of Cassation's insistence on the actual damage standard

However, the Court refused to condemn the unliquidated, provisional *astreinte* regardless of its amount. It was, after all, only provisional. Judges were entitled to threaten financial disaster in order to procure the performance of an obligation, but they must not fulfill the threat. They were required to demonstrate in their decision the correlation between the actual damage and the liability ultimately imposed. This state of affairs led Professor Dawson, in his 1959 study of specific performance in France and Germany, to conclude that the promisee's entitlement in principle to performance "is almost wholly meaningless where the *astreinte* is the only means employed for its realization."<sup>14</sup>

Despite the restrictions imposed by the Court of Cassation, the *astreinte* survived, illustrating the need for such a device to compel contract performance. Apart from its effects on the timid or ill-advised litigant, the *astreinte* undoubtedly preserved a certain force to the extent that it suggested that the judge who imposed the *astreinte* might later solace himself and the disappointed litigant with an exaggerated, but difficult to contest, damage award if performance was not forthcoming.<sup>15</sup> Some judges were prepared to order provisional execution on goods which were being held under judicial control pending the final judgment awarding damages.<sup>16</sup> These developments essentially undermined the rule imposed by the Court of Cassation. That court's ability to exert control over damage assessments by the lower courts is very limited, so long as their decisions evidenced meticulous adherence to the norms the court announced. It is difficult to assess the force and utility the *astreinte* retained under these circumstances. It was obvious that the *astreinte* was not what it purported to be and any well-advised obligor willing to risk such exaggeration of damages as the circumstances and judicial discretion might support had little to lose by ignoring it.

Such was the situation in 1959, when the utility of the *astreinte* reached its lowest point. The same year saw the beginning of its ren-

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which occurred in the early 1950's was a reflection of the legislative condemnation of the use of the *astreinte* to expel hold-over tenants from leased premises during the critical housing shortage of the early post-World War II years. Law of July 21, 1949, Dommages-Intérêts-Astreintes, [1949] J.O.7183 ([1949] B.L.D. 755); and see Raynaud, *La Distinction de l'astreinte et des dommages-intérêts dans la jurisprudence française récente*, MÉLANGES SECRETAN 249 at 251 (1964) and Dawson, *supra* note 1, at 519-21.

14. Dawson, *supra* note 1, at 524-25.

15. The doctrinal writers had no doubt that the courts willingly used their margin of appreciation in the assessment of damages at the time of the liquidation of the provisional *astreinte* to increase the burden on the recalcitrant debtor. See, e.g., *L'Astreinte*, *supra* note 10, at § 15.

16. See Fréjaville, *La Valeur Pratique de l'Astreinte*, [1951] J.C.P. 910; and Dawson, *supra* note 1, at 521-22.

aissance. On October 20, 1959, the Court of Cassation decided a case in which the Court of Appeals of Rioms<sup>17</sup> had imposed an *astreinte* of 10,000 old Francs per day for a period of three months or until the defendant had performed the modification of an industrial installation which encroached on plaintiff's property. When the defendant company failed to perform, the plaintiff demanded liquidation of the first *astreinte*, and the imposition of a new and more severe *astreinte*. The Court of Appeals acceded to the plaintiff's request and awarded judgment for 900,000 old Francs in liquidation of the first *astreinte*. Defendant brought a *pourvoi* alleging that the Court of Appeals had erred in awarding a judgment not based on actual damage. The Court of Cassation refused to overrule the Court of Appeals. It declared that the provisional *astreinte* is a means of compulsion entirely distinct from damages. The liquidated amount of the *astreinte* should be determined, as the Rioms Court had done, by taking into account the circumstances aggravating or extenuating the recalcitrant debtor's refusal to perform, such as the seriousness of his fault and his resources. In essence, the *astreinte* must be made to hurt if it is to have the desired result.<sup>18</sup>

The October 20, 1959 decision opened the way to the effective use of the provisional *astreinte* for procurement of specific performance of contractual obligations as well as for the execution of other judicial orders. At the same time, it aggravated the confusion surrounding the distinction between the provisional and the definitive *astreinte*. The October 20, 1959 decision bore uniquely on the provisional *astreinte*, i.e., the *astreinte* ordered by a decision which only becomes executory after a process of liquidation in which the circumstances and the resources of the debtor have been reconsidered and the amount to be paid recalculated in light of that reconsideration. The definitive *astreinte*, pronounced without possibility of revision, remained subject to the actual damage rule. Notwithstanding the additional coercive power which might have been attached to an *astreinte* were the rate not open to further revision by the court, only the provisional *astreinte* was recognized as a coercive technique within the compass of the October 20, 1959 decision. A condition of the imposition of an *astreinte*, where the liquidated amount exceeds provable damage, was that the debtor have an opportunity to perform and that his liability for delay or refusal to perform be finally determined only after that opportunity

17. Pradon c. Société de production d'énergie électrique de la Sioule (Ct. App. Rioms) see note 18, *infra* for review by the Court of Cassation.

18. Société de production d'énergie électrique de la Sioule c. Pradon (Cass.civ.lère, 20 oct. 1959) [1959] Bull.civ.I.910 [1959] S. Jur.III 225.

has passed. The liquidation of an *astreinte* which did not satisfy that condition could only be compensatory and not coercive. The definitive *astreinte*, also, required increased coercive power. The Court of Cassation practically invited the lower courts to camouflage the penalty as a damage award. It held that the underlying assessment of damages for delay was an issue of fact within the discretion of the court imposing the definitive *astreinte* and not subject to review.<sup>19</sup> The 1959 decision initiated a jurisprudential development which was to be codified and completed by legislative action in 1972.

The 1972 legislation on the *astreinte* began as a private member bill introduced in the National Assembly by two law professor Deputies, Jean Foyer and Pierre Mazeaud.<sup>20</sup> No action was taken on their bill, but, when Foyer and Mazeaud were appointed co-reporters for the National Assembly committee examining a government bill on civil procedure, they took the opportunity to reintroduce their proposal as an amendment to the government bill.<sup>21</sup> Essentially, the proposal confirmed the case law of the Court of Cassation on the provisional *astreinte* which had, since the 1959 decision, (i) confirmed the power of the courts to order an *astreinte* not limited by the amount of actual damage suffered by the plaintiff,<sup>22</sup> (ii) recognized that this power was exercisable by the court on its own initiative,<sup>23</sup> and (iii) held that, being independent of damages and essentially a means of assuring compliance with a judicial order, the *astreinte* could be liquidated by the judge who had ordered it even if that judge were incompetent to decide the damage issue.<sup>24</sup> The Foyer-Mazeaud proposal also recognized the coercive utility of the definitive *astreinte* and authorized the imposition of a definitive *astreinte* free of the actual damage limitation.<sup>25</sup> Finally, Foyer and Mazeaud sought to moderate the private

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19. *Lamare c. Prevost* (Cass.civ.lère, 4 nov. 1959) [1959] Bull. Civ. 1.381. On the definitive *astreinte* after 1959 see generally Rassat, *L'Astreinte definitive*, [1967] J.C.P.I. 2069.

20. Proposition de loi relative à l'*astreinte* en matière civile, Assemblée nationale, Doc. no. 1658, Première session ordinaire 1970-71.

21. See Rapport fait au nom de la Commission des lois, etc., Assemblée nationale Doc. no. 2447, Seconde session ordinaire 1971-72 [hereinafter cited as A.N. 2447].

22. Proposed amendment no. 19, *id.* at 29, essentially incorporating the Court of Cassation's decision of 20 oct. 1959, *supra* note 18.

23. Proposed amendment no. 18, A.N. 2447 at 28. The Court of Cassation adopted the same position in *Adam c. Marino* (Cass.civ.3e, 28 avril 1968) [1968] Bull.Civ.III. 137 ([1968] D. 526).

24. Proposed amendment no. 20, A.N. 2447 at 29, and see *Administration des Douanes c. Socodemix* (Cass.ass.plén. 13 mai 1966) [1966] Bull.Civ.III.3 ([1966] J.C.P.I. 14786).

25. Proposed amendment no. 19, A.N. 2447 at 29. For the contrary position of the Court of Cassation, see authorities cited *supra* note 19.



penalty problem, and, incidentally, assist judges who were hesitant to apply a measure which seemed unjustly to enrich one party to a civil action.<sup>26</sup> They proposed that the amount recovered from the defendant in execution of an *astreinte* be paid half to the private plaintiff and half to the public treasury.<sup>27</sup>

The government supported the Foyer-Mazeaud proposal,<sup>28</sup> and, insofar as it confirmed and provided a statutory basis for existing judicial practice, it encountered no serious resistance in the legislative process. However, the consecration of the definitive *astreinte* and the proposal to split the proceeds between the plaintiff beneficiary of the *astreinte* and the public treasury ran into strong opposition in the Senate. Against the definitive *astreinte* it was argued that the increased coercive power derived from the imposition of an *astreinte* at a rate not subject to revision was more than counter-balanced by the likelihood that substantial injustice would result in many cases if the judge were not free to redetermine the amount of the *astreinte* in light of all the circumstances surrounding the failure to execute the court's order.<sup>29</sup> Against the proposed allocation of a portion of the proceeds of the *astreinte* to the State in recognition of its penal character, it was argued that since the *astreinte* was made necessary by the refusal of the administration to supply the force required to compel compliance without an *astreinte*, it would be paradoxical to allocate a portion of the proceeds of the *astreinte* to the public treasury.<sup>30</sup>

The National Assembly sought to soften Senate opposition by amending the bill to allow the judge to determine in his discretion an appropriate allocation of the proceeds of the *astreinte* between the party and the State. Additionally the State's share would be allocated to the National Solidarity Fund, a specially funded institution which provides certain benefits to the aged and retired persons.<sup>31</sup> The Senators were unimpressed. The disagreement was finally compromised by the

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26. See A.N. 2447 at 12.

27. Proposed amendment No. 22, A.N. 2447 at 29.

28. [1972] *Journal Officiel*, éd. *Débats parlementaires — Assemblée nationale* 2811 [hereinafter cited as J.O.A.N.], remarks of M. Pleven, Minister of Justice.

29. [1972] *Journal Officiel*, éd. *Débats parlementaires — Sénat* 1367, 1370 and 1424 [hereinafter cited as J.O.S.], remarks of M. Bellegou, reporter for the Senate committee charged with the examination of the bill.

30. [1972] J.O.S. 1371, remarks of M. Bellegou and the apparent recognition by M. Pleven of the "paradox."

31. [1972] J.O.A.N. 3014. The *Fonds national de solidarité* was established in 1950 to provide certain benefits, e.g., pension supplements, to elderly persons to complement those available under the general Social Security program. See C.Séc.Soc. arts. L684-L711 and Decree no. 56-733, as amended. C.Séc.Soc. arts. L705-712 (*Petits Codes Dalloz*, ed. 1974).

Senate's acceptance of the definitive *astreinte* and the National Assembly's abandonment of the proposal to allocate a portion of *astreinte* proceeds to the public treasury.<sup>32</sup>

Apparently, it was never suggested that the *astreinte* ought to be regarded as a form of constraint designed to reinforce the authority of the judge by a method inherently preferable to police intervention, making recovery of the amount of the *astreinte* by the State as a civil fine quite appropriate, whether or not it is also seen as rewarding the State for its failure to assist in the enforcement of civil judgments. Indeed, the Senate's *rapporteur* viewed the proposed allocation of a portion of the proceeds to the State as the upper end of a slippery slope toward the introduction of a civil fine. He pleaded "let us not introduce the notion of punitive sanction (*penalité*) into the relations between private litigants."<sup>33</sup> On this view, it is of no relevance that punitive sanctions already exist, since the penalty clause and the *astreinte* as traditionally conceived were incorporated in the portions of the bill accepted by the Senate, for so long as the penalty is not paid to the State, the essentially private character of the relationship between civil litigants and the purely umpireal role of the State and its courts is preserved. The strong attachment, especially of the bar, to this concept of civil justice tends to inhibit reform not only in such matters but more particularly in the effort to modernize the system of civil procedure.<sup>34</sup>

With the adoption of the Law of July 2, 1972,<sup>35</sup> the *astreinte* has undergone a complete renewal. It may be considered as effective as a money judgment can be for compelling specific performance of a contractual or other obligation. The judge may impose the *astreinte* on party application or on his own initiative. He may either fix the amount definitively or leave it open to redetermination upon liquidation. The *astreinte* has now been statutorily characterized as a coercive measure the amount of which is not in any sense restricted by the actual damages suffered by the beneficiary of the *astreinte*.

The *astreinte* has, from its origin, been a discretionary technique available to the judge to procure compliance with an obligation to perform by the application of financial pressure. It is not, however, the only means of applying such pressure practiced by the French legal

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32. [1972] J.O.S. 1455; [1972] J.O.A.N. 3096.

33. [1972] J.O.S. 1367, remarks of M. Bellegou.

34. This attachment is exemplified in, e.g., Martin, *Réflexions sur l'Instruction du Procès Civil*, [1971] REV. DR. CIV. 279.

35. Law no. 72-626 of 5 July 1972, instituant un juge de l'exécution et relative à la réforme de la procédure civile, arts. 5-8, [1972] J.O.L.D. 7181, ([1972] B.L.D. 362).

system. A party to contract negotiations who is determined to obtain performance rather than damages, and who is skeptical either of the willingness of a judge to impose an *astreinte* or of its effectiveness, can seek to include a penal clause in the contract.

## II. PRIVATE COMPULSION: THE PENAL CLAUSE

The aversion to non-compensatory money judgments in civil litigation which characterized the pre-1959 case law of the Court of Cassation on *astreintes*, might have been expected equally to stimulate strong resistance to the enforcement of contractual penalties, especially in cases where the penal sum demanded was extravagant in relation to actual damage. However, until 1975, the parties to a contract containing a penal clause could count on its being enforced without modification and without regard to actual damage, if the clause were carefully drawn and if the disappointed party were prepared to pursue the matter all the way to the Court of Cassation.

The penal clause was legitimized and, somewhat ambiguously, freed from the compensatory principle by nine articles of the Civil Code, 1226 through 1233, which form a section entitled "Of Obligations with Penal Clauses," to which must be added Article 1152 on agreed damages. Article 1226 offers a definition which recognizes the coercive, performance-oriented purpose of the penal clause. Article 1229 states that the "penal clause is compensation [sic] for damages" resulting from non-performance. In context this assertion is apparently intended to explain why the creditor cannot have both compensatory damages (or performance) and the penalty, except, of course, where the penalty is payable for delay in performance. The Article 1229 definition has been relied upon by the doctrinal writers to link the penalty, as a form of damages, to Article 1152's requirement that parties who have agreed on damages be given precisely what they have agreed.<sup>30</sup> The immutability of the agreed penalty is also affirmed by negative implication in Article 1231 which provided, in the original text, "[t]he penalty may be modified by the judge when the obligation has been partly

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36. See, e.g., Chabas, *Clause Pénale* in (1971) J.C.C. at arts. 1146-51. Apparently nothing has ever been made of the verbal distinction which the Code draws between "damages" (*dommages-intérêts*) and "penalties" (*peines*). The former expression is used in article 1152 (on agreed damages) and the latter in articles 1226-33 (on conventional penalties). The two expressions have been treated as essentially equivalent. *Id.* Agreement on the consequences of breach thus simply excludes operation of the compensatory standards announced in articles 1146-51 and there is no separate legal regime for penalties despite the apparent distinction suggested by the use of the two different expressions in the Code.

performed." The notion of part performance in Article 1231 will be examined later. For the moment it need only be noted that this provision did not offer a substantial opportunity for judicial modification of agreed penalties. In approving the penal clause and sheltering the amount of the penalty from judicial scrutiny, the draftsmen of the Code were faithful to the principle of freedom of contract expressed in Article 1134's celebrated declaration that "agreements lawfully entered into make law for the parties." In so doing, the draftsmen departed from the doctrine of Robert Pothier, whose writings so largely dominated their work on obligations. Pothier, whose treatment of penal clauses<sup>37</sup> is otherwise substantially reproduced in these articles of the Code, would have allowed the judge to substitute actual damages for a manifestly excessive penalty.<sup>38</sup>

The Court of Cassation has consistently held that penal clauses are to be given full effect, however extravagant they may appear.<sup>39</sup> Neither the plaintiff's failure to prove actual damage<sup>40</sup> nor considerations of "justice and equity"<sup>41</sup> justifies refusal to enforce the full penalty. *Force majeure* or impossibility might suffice to avoid the penalty on the ground that performance of the principle obligation was thereby excused, but only where the parties clearly did not intend the penalty to apply to *every* case in which the agreed performance was not rendered.<sup>42</sup> Article 1231, permitting reduction of the penalty where the defendant had performed part of the obligation, provided relief in some cases, but only where the parties themselves neither provided for a scaling down of the penalty where the creditor had received some value prior to default, nor made it clear that the full penalty was payable notwithstanding part performance.<sup>43</sup>

It is difficult to assess the frequency of use of penal clauses prior to the 1960's. If the penal clauses were in fact frequently used, they may have provided an important alternative to the *astreinte* thereby reducing concern over the practical deficiencies of the pre-1959 *astreinte*. In any event, contract penalties caused little concern and

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37. 2 POTHIER, *OEUVRES (OBLIGATIONS)* 173 (ed. 1861).

38. *Id.* at 179 (§ 345).

39. *E.g.*, *Mendouze et Alezaïs c. Mauron*, (Cass.civ., 4 juin 1860) [1860] D.I. 257 and cases cited *infra*, notes 40 and 41.

40. *Cf.*, *S.à.r.l. Réseau Téléphonique du Midi c. Société des entrepôts ménagers* (Cass.comm., 2 nov. 1967) [1967] Bull.Civ.III 333.

41. *Delacour c. Buffet* (Cass.civ., 23 mai 1940) [1940] D. Jur. 161.

42. *Supra* note 36 at § 13, and, *e.g.*, *Belmondo c. Société Paris-film Production* (Cass.civ.5e, 26 nov. 1970) [1970] Bull.Civ. V. 538.

43. *Mendouze et Alezaïs c. Mauron*, *supra* note 39.

were generally enforced. The law in this area was thrown into crisis by the practice of the equipment leasing industry whose form contracts generally included a sizeable penalty which became due upon cancellation for failure to pay rent.<sup>44</sup> Defaulting lessees, commercial enterprises in most cases, attacked the clauses on every conceivable ground. They were frequently successful before the lower courts, including Courts of Appeal, producing a "judicial rebellion"<sup>45</sup> against the case law of the Court of Cassation.

The reaction of the lower courts was explainable by the extravagant character of the equipment-lease penalty clauses of the late 1960's such as the following:

[i]n case of non-performance by the lessee of his obligation, and particularly in case of failure [to make required rental payments], the lessor shall have the right to rescind the lease [upon notice] by registered letter, and the lessee shall be bound to put the equipment at the disposition of the lessor as provided [above] and, as damages, hereby fixed in a single lump-sum, the total amount of rents provided for the term of the contract shall become immediately due and payable subject only to the deduction of sums already paid.<sup>46</sup>

Defaulting lessees searched codes, statutes, case law and doctrine for resources with which to challenge penal clause orthodoxy and to resist enforcement of these clauses.

The judicial response ranged from grudging enforcement of clauses, which one court called "regrettably severe,"<sup>47</sup> to invalidation of the clause on the very dubious ground that it was a *clause léonine*.<sup>48</sup> The three most serious arguments focused on the court's power to modify

44. The advent of "le leasing" (re-christened *crédit-bail* by a 1966 statute, Law of 2 July 1966 relative aux entreprises pratiquant le crédit-bail, [1966] J.O.L.D. 5652 ([1966] B.L.D. 287) and an early judicial decision concerning this form of financing are described in Jusseaume, *France: Le Leasing*, 14 AM. J. COMP. L. 685 (1960).

45. Alfandari, *Le contrôle des clauses pénales par le juge*, [1971] J.C.P.I.2395, and see e.g., Vendôme-équipement Transéco c. Conchou (Trib. Gd. Inst., Bergerac, 20 mars 1969) [1969] Gaz. Pal. 2.67; Locabail c. Gouis (Ct. App. Paris, 27 jan. 1970 [1970] J.C.P.I.16155; Nourry c. Locafrance (Ct. App. Paris, 27 juin 1970) [1970] J.C.P.I.16376; Etab. Lucanes c. Société Magneta Téléphone (Ct. App. Paris, 4 mars 1971) [1972] D.I.582.

46. This clause appears in the lease examined by the Tribunal de Commerce of Grenoble in Locabail c. Gouis, *supra* note 45.

47. Etab. Magenta c. Roquette (Trib. Comm. Versailles, 15 jan. 1969) [1969] Gaz. Pal. I. 158.

48. Vendôme-équipement Transéco c. Conchou, *supra* note 45. A *clause léonine* is one which reserves the benefit of a bilateral contract to one party while imposing the burden on the other. Only in the contract of *société* (partnership) is the *clause léonine* expressly recognized as a basis of invalidity (see C.Civ. art. 1855) but the concept has occasionally been applied in other kinds of contracts.

a penal clause under Article 1231, the prohibition against cumulating penalty with damages or performance, and the concept of cause.

The first argument that a leasing contract was necessarily subject to partial performance, and hence that its penal clause was within reach of the moderating power conferred by Article 1231<sup>49</sup> caused considerable concern to the leasing industry. The argument generated a doctrinal response which attempted to show that the "nature" of the leasing contract was such that it was "indivisible" and therefore could not be partially performed.<sup>50</sup> The Court of Cassation reaffirmed its early decisions holding that Article 1231 was applicable only where the parties themselves have failed to provide for the case of default after part performance.<sup>51</sup> After some hesitation,<sup>52</sup> the Court also held that the intention to exclude application of Article 1231 could be implied where the amount of the penalty payable in the event of default declined as the period of performance lengthened.<sup>53</sup> This was, of course, always the case with contracts which imposed a penalty equal to the amount, or to some proportion of the amount, of the unpaid rents.

The second argument concerning an alleged cumulation of penalty with damages or performance was based on Articles 1184 and 1229 of the Civil Code.<sup>54</sup> Article 1184 implies the right to rescind for non-performance in bilateral contracts and provides that the performing party may either insist on performance by the other or demand rescission with damages. It was argued that the lessor who obtained rescission and thus recovered the leased equipment could not also insist on performance of the penalty clause. This argument runs into difficulty in Article 1229 which asserts that the penalty is a form of damages. However, Article 1229 also declares that the penalty, as

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49. See *Locabail c. Gouis*, *supra* note 45, and the note of M. B. Boccara which accompanies the report in the J.C.P.

50. See Bey, *Les aspects juridiques de la convention de crédit-bail immobilier*, [1969] J.C.P., édition Commerce et Industrie, I.86634, and the note signed E.M.B. accompanying *Garrigues c. Locafrance* (Ct. App. Toulouse, 8 mai 1970) [1970] J.C.P.I.16481.

51. *Mendouze et Alezaïs c. Mauron*, *supra* note 39.

52. In several cases, the Court of Cassation indicated that the lower courts' interpretation of the contract — as to whether the application of art. 1231 had been excluded by agreement — was not subject to review. See, e.g., *Société Téléphonique Européenne c. Pernot* (Cass.comm. 3 nov. 1969) [1970] J.C.P.I.16376 and the ups and downs of *Poirson c. Lenoir* (Cass.civ.3e, 29 nov. 1972) [1972] Bull. Civ.III 473 [1974D.2] described in the note signed Ph. M. which accompanies the report in the *Recueil Dalloz*.

53. *Locafrance c. Nourry* (Cass.comm. 4 juillet 1972) [1972] D.I.728.

54. Boccara, Note to J.C.P. report of Zysmann c. *Société de Transports Soradis* (Ct. App. Rouen, 3 juillet 1970) [1970] J.C.P.I.16581.

damages, could not be recovered if execution was also required. It was indicative of the intensity of judicial revulsion against the equipment-lease penal clauses, that one lessee-defendant was able to persuade the Court of Appeals of Paris that the lessor was both recovering the penalty and obtaining performance because the amount of the penalty was measured by the rent remaining due.<sup>55</sup>

The third argument focuses on the concept of *cause*. The mysteries of the doctrine of *cause* in French contract law cannot be explored here, but the several aspects of the theory of *cause* which came into play in the equipment-lease penal clause controversy merit brief attention. First, there was the lessee's appeal to the doctrine of unjust enrichment — nowhere provided for in the general terms by the Civil Code but firmly established in the case law — to attack the penal clause.<sup>56</sup> *Cause* was critical in the defeat of this most obvious line of attack. The kind of enrichment with which the French doctrine is concerned is not *unjust* enrichment but rather enrichment *without cause* which, in most cases, amounts to the same thing.<sup>57</sup> But in attacking either the penal clause or the *astreinte* an argument of unjust enrichment runs afoul of *cause* because in each case a classic *cause* — the contract in the one, and the judgment in the other — is present.<sup>58</sup>

Secondly, it was asserted that the obligation to pay the penalty was deprived of the indispensable *cause* by recovery of the leased equipment.<sup>59</sup> *Cause* in this context is closely analogous to consideration in Anglo-American law. Thus, the argument amounts to the following: the consideration for each rental payment was a certain period of usage of the leased object and thus consideration failed as to all subsequent periods when the leased equipment was repossessed. The difficulty, of course, was that the leasing contracts did not so provide; if some did, the forms were easily modified.

Apart from some hesitation over the application of Article 1231, the Court of Cassation held firmly to the immutability and full en-

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55. *Sté Téléphonie Européenne c. Pernot* (companion case to *Nourry c. Locafranco*) see note 45. See also *France-Bail c. Bez* (Cass.comm. 30 avril 1974) 1976 J.C.P.I.18282, rejecting this argument.

56. Only one reported case has been found in which this argument was made, and it was rejected, *Etab. Magenta c. Roquette*, *supra* note 47. The argument is developed briefly here only because the Common Law rejection of penalties is in part founded on aversion to the unmerited enrichment of the party recovering the penalty.

57. See MARTY et RAYNAUD, *supra* note 1, at 316-17.

58. *Id.*

59. The principal proponent of the absence of *cause* argument was Boccard. See his note, *supra* note 54, and his note to the J.C.P. report of *Locabail c. Gouis*, *supra* note 49. This thesis was accepted by the Paris Court of Appeals in *Sté Téléphonie Européenne c. Pernot*, *supra* note 55.

forceability of penal clauses throughout the period of controversy running from the late 1960's until Articles 1152 and 1231 were modified by legislation introduced by private member bill, again authored by Jean Foyer,<sup>60</sup> and adopted in July 1975.<sup>61</sup> The amendments did not disturb Article 1152's prohibition of a damage award in an amount different from any amount agreed upon by the parties, but added the following qualification: "Nevertheless, the judge may reduce or increase the agreed penalty, if it is manifestly excessive or derisory. Any stipulation to the contrary shall have no effect."<sup>62</sup> Article 1231 was completely recast to read as follows:

When the undertaking has been partly performed, the agreed penalty may be reduced by the judge in proportion to the benefit procured to the creditor by the partial performance, without prejudice to the application of Article 1152. Any stipulation to the contrary shall have no effect.<sup>63</sup>

The new texts clearly mark the abandonment of the rigid enforcement of penal clauses which has for so long been a distinctive characteristic of French contract law. It seems likely, however, that the texts themselves will cause difficulty for it is far from clear precisely what mandate is now given to the judge who is called upon to enforce a contract penalty. There is no doubt that the new Article 1231 overturns the Court of Cassation's ruling that the parties can by agreement preclude application of the moderating power of the judge. Article 1231, as well as the new language in Article 1152, has been made a matter of *ordre public*.

Unless extensive interpretation and application of the modifying power granted by the amended Article 1152 preempts, as it well may, the power granted by new Article 1231, revival of doctrinal controversy in respect of part performance appears highly likely. The principal difficulty presented by the amended texts, however, lies in the interpretation of the standard for the exercise of the moderating power accorded by the amendments to Article 1152.

It seems clear both textually and from the legislative history that the new language was not intended to reduce the penal clause to a liquidated damage provision of greatly diminished coercive power. The reporter for the Senate committee which examined the bill affirmed

60. Proposition de Loi, A.N. Doc. no. 1365, Première session ordinaire de 1974-75.

61. Law no. 75-597 of 9 July 1975 modifiant les arts. 1152 et 1231 du code civil sur la clause pénale, 1975 J.O.L.D.7076 ([1975] B.L.D.240).

62. *Id.*, art. 2.

63. *Id.*, art. 1. The new texts are extensively commented upon in Boccara, *La Réforme de la Clause Pénale*, [1975] J.C.P.II. 2742.



that "it seems useful . . . to maintain the penal clause . . . which has a salutary coercive effect"<sup>64</sup> and considered that the proposed amendments did not destroy that utility. The text added to Article 1152 tends to confirm this view for it permits, but does not require, the judge to modify the penalty in cases in which he finds it to be "manifestly excessive" (*manifestement excessif*). The power accorded the judge to increase a "derisory" penalty is troublesome if the interpreter views the text symmetrically in light of a single purpose — the protection of penal clauses aimed at inducing performance through greater-than-actual-damage recovery, for it is difficult to imagine upward revision to an amount in excess of actual damage.<sup>65</sup> One can nevertheless conceive of the use of this power to overcome a penalty clause or agreed damage clause which has the effect of under-compensating actual damage. The legislative history confirms this as the purpose of this segment of the amendment to Article 1152.<sup>66</sup> The remainder of the amendment, clearly indicates, especially in light of the draftsmen's particular concern with lease penalties, that the moderating power established by the amendment to Article 1152 was intended to avoid "overkill" rather than to eliminate penalties altogether by imposing an actual damage rule.

With this objective established, the new language of Article 1152 leaves the parties at the mercy of almost wholly unguided judicial discretion. The same penalty may be viewed as "manifestly excessive" where it far surpasses provable damage, but, it may appear wholly reasonable if one attempts retrospectively to assess an appropriate penalty level for the purpose of inducing a strong preference for performance on the part of the obligor. A court sufficiently imbued with the sanctity of contracts might prefer to examine the clause in light of the circumstances known to the parties when they enter into the contract. However, when the clause is litigated it will already have failed in its coercive purpose and actual damages will, in principle, be determinable. The temptation will become strong to evaluate the penalty in light of that determination and of the circumstances of breach. The Italian Civil Code, Article 1384 of which employs the notion of "mani-

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64. Rapport fait au nom de la Commission des lois etc., A.N. Doc. no. 1603, Seconde session ordinaire de 1974-75, at 6.

65. There is, however, one case in which a theatre succeeded in persuading the court to demand damages in excess of the agreed penalty. There an actor refused to perform, but was willing to pay the agreed penalty. The court characterized this conduct as wilful. *Société des comédiens français c. Giraud* (Cass.civ.4 fév. 1969) [1969] D.601 ([1969] J.C.P.II.16030). But the case is more nearly the French tort of abuse of right than a case which turns on the actual penalty.

66. [1975] J.O.S. 1746, remarks of M. Lecanuet, Minister of Justice.

fest excess" to direct judicial discretion in the reduction of penalties, provides further that the court must also consider the "interest which the creditor has in performance."<sup>67</sup> Even that modest additional guidance is withheld in the French text. Moreover, even if the penalty is found manifestly excessive, its reduction remains a discretionary matter. Standards may be easier to work out at that stage. The bad faith of the obligor in withholding performance might be pertinent, but it is difficult to imagine that any sharp distinction will be drawn in practice between the evaluation of the excessive or reasonable character of the penalty and the decision to adjust its amount.

The doctrinal effort to add flesh to the extended skeleton of Article 1152 has begun. One can already see the plain meaning of the word "manifestly" (*manifestement*) cracking under the strain of doctrinal elaboration. In the first extended study of the revised texts to appear in the law journals,<sup>68</sup> Bruno Boccara offers a schema which divides penalties into three kinds: those which are a damage substitute, those which merely (*simplement*) exceed actual damage and those which are manifestly excessive. Only the last category falls within the moderating power of the judge under Article 1152. But the dictionary says that *manifestement* means "obviously" or "evidently."<sup>69</sup> That, according to Boccara, cannot be the statutory meaning. To accomplish the legislative purpose the word must be taken to mean "out of proportion" (*démésuré*) in the context of Article 1152.<sup>70</sup> Boccara gets into this exercise in an effort to work a safe harbor into the text for the penalty which exceeds actual damages and is therefore "excessive" in that regard but which is not excessive as a performance-inducing device. He accomplishes that task more persuasively through reliance on the legislative history<sup>71</sup> than he does by attempting to graft a graduated scale of "excessiveness" onto Article 1152. One would have thought that *manifestement*, true to its ordinary meaning, merely requires that the court resolve doubtful cases against decision, leaving whole the prob-

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67. Article 1384 of the Italian Civil Code provides:

The penalty may be reduced equitably by the judge if the principal obligation has been partly performed or if the amount of the penalty is manifestly excessive, having regard to the interest which the creditor has in obtaining performance.

Professor Gorla argues that the "excessiveness" of the penalty should be judged in relation to the purpose of procuring performance and not that of satisfaction or reparation of damage. 2 GORLA, *IL CONTRATTO* 258 (1954).

68. See Boccara, *supra* note 63.

69. ROBERT, *DICTIONNAIRE ALPHABÉTIQUE & ANALOGIQUE DE LA LANGUE FRANÇAISE* 1038 (1970).

70. BOCARA, *supra* note 63 at §§ 23-24.

71. *Id.* at § 22.

lem of finding a suitable standard for distinguishing excessive from non-excessive penalties. Be that as it may, Boccara probably is nearest the mark, as a practical matter, when he observes that it is "to be feared that the Court of Cassation will consider this notion of manifest excess . . . as [a matter within] the sovereign [unreviewable] appreciation of the judges of fact [*juges du fond*]."72 Even if the Court of Cassation decides to get into the business of elaborating a standard for the exercise of the modifying power of Article 1152, it can scarcely do more than direct the lower court judges to insure that the amount of the penalty is fixed at a level which, in their estimation, would have been an appropriate and reasonable deterrent to breach by the party subject to the penalty under the circumstances. Since any penalty that is the object of an action for collection was necessarily insufficient to procure performance, the judge confronts a dilemma. He knows that the plaintiff in fact underestimated the amount of the penalty required to stimulate performance by the defendant, assuming that an adequate penalty would have compelled performance. The judge can then only aggravate the plaintiff's underestimation by further reducing the penalty. The result is likely to have less to do with the deterrent function of the penal clause than with the judge's subjective response to the question how much this defendant should be punished over and above liability for actual damage in light of all the circumstances. The penal clause would thus become a mechanism authorizing the judge to impose punitive damages otherwise unknown to French civil law, except to the extent that the *astreinte* may be so regarded. The creation of that authority by contract certainly heightens the risk incurred by the party who fails to perform, but that risk is necessarily less dissuasive than was the almost certain enforcement of the penalty under the prior law. The degree of risk, and consequently, its coercive force, will depend not upon standards formulated by the Court of Cassation but upon the practice of the lower courts.

### III. CONCLUSION

The principal means of compelling or inducing specific performance of contractual obligations in France remain those whose ultimate sanction is the money judgment recoverable by the party seeking performance. For a time, in the 1950's, when the *astreinte* had reached its nadir, the penal clause in the contract was the only method by which a money judgment adequate to deter breach could credibly be threat-

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72. *Id.* at § 31.

ened against a party willing to face a judgment based on provable damage. In ruling on the *penal clause* the amount of the penalty was beyond the control of the judge while, in the case of the *astreinte*, the amount was to be determined by him. However, in the *astreinte*, the judge's ability to use the threat of a money judgment to coerce performance was restricted by the duty ultimately to assess only provable damage. The last few years have seen a major shift in this structure. The judge's power to control that part of the liability in excess of the actual damage resulting from the obligor's failure to perform under a contract containing a penal clause has been vastly augmented while his ability to achieve approximately the same result in the absence of a penal clause has been restored through the rehabilitation of the *astreinte*.

This evolution has been largely motivated by a desire to insure the ability of the courts to order performance, and by concern over certain apparent abuses of the penal clause. Through it all the most surprising element for the observer accustomed to the Common Law approach to such matters is the relatively low level of concern with the unmerited enrichment of the promisee which is inherent in both devices. A legal system which claims to be opposed in principle to private penalties and to the introduction of penal elements in civil litigation might be expected to seek other solutions to the contract performance problem.

That the French system has not done so is perhaps only to be explained (if one refuses to take M. Bellegou's "paradox" at face value) by the traditional antagonism between the citizen and *l'État* (better my opponent recover the penalty than that it go to the State), and by the profoundly rooted belief that a civil action is the parties' affair and not the State's: *l'action est la chose des parties*, a notion which permeates French civil procedure and can perhaps be traced into this area of remedial law.

